No. 1167.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

J. D. SPRECKELS & BROS. CO.,
Appellant,

vs.

C. W. CORSAR,
Appellee.

PETITION FOR A REHEARING.

CHARLES PAGE,
EDWD. J. MCCUTCHEN,
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Pernau Press.

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On behalf of the "Musselcrag", we pray for a rehearing in this cause. Our petition is based upon our belief that the majority of the court has overlooked the application of two rules of law, as we understand them, to the facts of the case, and has made a mistake in the consideration of the question of the weight of evidence.

I.

We concede the correctness of the rule quoted in the opinion of Judge Ross from the case of *The Ports-*

mouth, 9 Wall. 682, that if damage be caused *by the carrier's fault,* he is liable, even though a sea peril "be present and enter into the case". The efficient cause under such circumstances, not the cause nearest in point of time to the disaster, is to be deemed to be the cause upon which responsibility is based.

The rule, however, does not assume to say that *the mere presence* of a fault on the carrier's part prevents the defense of sea-perils. Such fault must be the *efficient* cause of the disaster, not merely a concomitant, of another cause, which is the efficient cause.

No ship should sail with an improper compass. Yet, if while sailing in sight of land, a fog and calm of several days' duration settle upon the waters and treacherous currents drive such a vessel upon the rocks, the court would not hesitate to say that the sea peril was the efficient cause of the disaster, and that the breach of the warranty of seaworthiness in failing to have a proper compass, was not a reason for decreeing a recovery against the owner.

If, in the case at bar, the court is justified in finding that the ship sailed from Antwerp in an unseaworthy condition *and* that this unseaworthiness was the *efficient* cause of the injuries which she suffered in the gales and hurricanes off Cape Horn, the judgment is in accordance with the decisions. But, if it appear that the weather encountered by the ship was of such a nature that it may justly be said, that even an absolutely seaworthy vessel would have strained and labored and suffered from its fury, then, we submit, that it is too

harsh an interpretation of the law to say that proof of the fact, even were such proof beyond question, that the ship's trim on leaving port tended, perhaps, to make her too stiff, is sufficient evidence that this fault was the *efficient* cause of the disaster, rather than the sea perils.

The matters of fact before the court are whether the stowage was so bad as to make the ship unseaworthy when she sailed upon her voyage to San Francisco and whether such fault, if there was any, was the efficient cause of the damage which she afterwards suffered.

Every ship, as is well understood, warrants to the cargo owner that, on sailing, she is *reasonably* fit in hull, equipment, crew and stowage, to meet the ordinary perils of the voyage. All losses thereafter caused to such a vessel, or her cargo, which are not attributable to negligence upon the voyage and are shown to be caused by the action of the sea, or by dangers attending navigation, are losses by sea perils.

> "Waves beating on the ship and so injuring her as to prevent or delay the voyage, or *causing her to roll or strain,* with the result that the goods become displaced and damaged, these are all losses by dangers of the sea."
>
> *Carver on Carriage by Sea,* Sec. 85.

> "It must be remarked that the losses need not be extraordinary, in the sense of arising from causes which are uncommon. *Rough seas, which are characteristically sea perils, are common incidents of a voyage. But damage arising from them, whether by their beating into the ship, or driving her on to rocks, is within the exception,*

if there has been no want of reasonable care in fitting out the ship and in managing her.

Carver, Carriage, etc., Sec. 87.

The rule regarding stowage is stated in *Lawrence v. Minturn,* 17 How. 100:

> The owner "contracts for the use of due care and skill in stowing the cargo and in navigating the vessel * * * (p. 112).
>
> "The master is bound to use due diligence and skill in stowing and staying the cargo, *but there is no absolute warranty that what is done shall prove sufficient*" (p. 115).

The contract of a chartered ship, not put up as a general ship, is not that "of a common carrier, but of " bailees for hire, bound to the use of ordinary care " and skill".

Sumner v. Caswell, 20 F. R. 251;
Lamb v. Parkman, 1 Sprague 353;
Nugent v. Smith, 1 C. P. Div. 423 (1876).

The "Musselcrag" was a large, beamy ship of great carrying power. She was loaded at Antwerp with a cargo of cement by stevedores whose ability may be assumed from their selection by the libellants. These worked under the general supervision of the master, a man of long experience who, however, had just joined this particular ship. The master and stevedore testified to the particular pains taken in making the stowage and to the fact that in their opinion, what they had done was well done and in the usual way and that the ship was seaworthy, as to stowage. In this respect, the ship's carpenter corroborated them. When the

ship left the River Scheldt and came into salt water, her cargo was insufficient to bring her down to her marks. She was, therefore, certainly not overloaded. This fact shows that allowance had been made for the dead weight cargo. In her hold, she carried 2350 tons, on her between decks 928 tons. It is contended that the disparity between these weights made the ship too stiff and that this was the efficient cause of the straining which she underwent when she reached the stormiest of latitudes. Two captains gave it as their opinions that the ship should have had more cargo above and less below; about 100 tons should have been transferred. Wilson, a San Francisco stevedore, testifying four years after the ship had discharged at San Francisco, corroborated these witnesses, and Burke, another stevedore, testified to facts concerning the stowage which in some particulars contradicted the master of the "Musselcrag". These witnesses, the majority of the court decides, carry more weight than those who testified on behalf of the ship. The court recites, as a fact, that all of the witnesses gave their evidence by deposition. *This is a mistake.* The four witnesses named testified *viva voce* before the lower court. That court declined to accept their expert evidence as against the direct evidence of the master and others of the ship's witnesses. And well it might have done so, in view of the exaggerations of Captain Quayle and the eagerness of Burke and Wilson.

These witnesses knew nothing of the "Musselcrag", as a ship, or of the effect upon her buoyancy of the precautions adopted by the master; they agreed that

the best judges of a ship's stowage were the master and stevedore who loaded her and who, they said, usually consult together as to the loading (Tr. pp. 103, 124); and they conceded that ships differ very much from each other in their buoyancy

> "One ship will require more ballast and another less, and it is for the master to judge whether any, and what ballast will be required by his ship during a proposed voyage, having regard to the nature of the proposed cargo."
>
> *Weir v. Union S. S. Co.,* 9 Asp. M. C. 112, 114.

> "Much latitude must be given to the master's judgment and the courts may not too nicely criticise his conclusions."
>
> *McLeen v. Davis,* 110 F. R. 576.

The master and carpenter, in performing their duties before the ship left port, had to consult the safety of their own lives, as well as that of ship and cargo, a fact not unworthy of consideration (*Lawrence v. Minturn,* 17 How. 111). Again, the master was acting for the ship and cargo, while thought of the safety of the cargo was chiefly in the stevedore's mind. Now, every ship rolls and strains in heavy weather, however well she may be loaded. This, as *Carver* says, is one of the perils of the sea (see *The Manitoba,* 104 F. R. 153). Deadweight cargoes, such as cement, are peculiarly trying in this respect. If this ship had not sufficient buoyancy, if she was too stiff to be manageable, one would expect that the heavy natural swells of the German Ocean, the English Chan-

nel, the Bay of Biscay and the Atlantic, acting normally, would have produced indications of the fact, yet the log and the evidence show that not until September 17th, *sixty days* after sailing (the ship left Antwerp July 19th), is any mention made of rolling and *then* it occurred when, at midnight, there had been *a heavy sea with southwest squalls*. This entry was followed by one reciting the taking in of the mainsail in the morning, an indication of still heavier weather. (See *Remarks from Logbook*, p. 3.)

With the first signs of bad weather, the master prudently overhauled his stowage, as the next day's record shows, and made all things secure. Are we right in saying that the decision of the court seems to imply, if not to say, that this is *an admission* that the ship's rolling had broken the cargo loose? Are we right in saying that the performance by the carpenter during part of a morning of the common duty of going over the seams of a deck and caulking where oakum is found to be slack, is taken by the court to be *an admission* that rolling had opened the ship's decks? If we are, then we fear that every ship that crosses the line from calms into storm seas, from torrid heat, which separates the oakum from the sides of the planks, into latitudes where rains are plentiful, and keeps a record of the doings of the crew, writes herself down as admitting unseaworthiness at departure!

Emphatically we claim, and respectfully we submit that these two months of experience at sea, without rolling or straining, indicate that the "Musselcrag" was sufficiently buoyant. It seems inadmissible to sup-

pose that the master, or mate, would not long before this time have discovered and recorded some evidence that the ship lacked the buoyancy which even a vessel carrying 3300 tons of cement should show.

The master was asked the question:

"At the time that you got as far as the Horn, what "evidence had the ship given, if any, of being too stiff, "or being too cranky?"

He answered: (*See original record for this answer, which escaped the printer.*)

"*No evidence whatever of being too stiff or too "cranky.*"

The mate and carpenter testify to the same facts from their own knowledge (*Faraday,* 42, 44; *Milne,* 28, 29).

As to these facts and as to the extraordinary character of the weather, we may quote the language of the Supreme Court used under analogous conditions:

> "In judging of the propriety of her manoeuvres, we are obliged to accept the testimony of her officers and crew as conclusive, since there is no other testimony to contradict it."
>
> *The Umbria,* 166 U. S. 409.

Here, then, we have the strongest evidence possible; the positive statements of men competent to judge of the situation, who tell us of what they saw, what their duty, their sense of self-preservation warned them to watch for. They have said they stowed the ship and that she was well stowed. They have said that, until the ship struck storms, she rolled only as all ships roll

which carry a heavy deadweight cargo. The logbook does not contradict their statements. Impliedly, as we have said, it corroborates them in part, and in part it explicitly confirms them.

In *Sumner v. Caswell,* 20 F. R. 251, the court said:

> "There was some rough weather; one storm was encountered, but the log gives no indication that it was of an extraordinary character, while the entries *from the first contain almost daily mention* of the great crankiness of the ship."

Captain Quayle sought, in his direct examination, to make the weather of the voyage the usual experience of those who round the Horn. There seemed to him to be nothing out of the way in the weather, or perils encountered, but even he, finally, *neither asserted the unseaworthiness of the stowage or attributed the damage to the stowage.*

When, on his direct examination, he was asked if there was anything stated in the log, *preceding the date of shifting cargo,* "to warn the master of the *condition of the vessel",* he answered:

" There is nothing preceding that out of the ordinary " except to indicate to the master that his vessel was " laborsome and *needed some cargo lifted from the " lower hold of the ship into the upper part of the ship " to make her more sea-kindly"* (Tr. p. 109).

At the time the cargo was shifted, October 12th, to which date the question referred, the ship had undergone *a terrific experience during twelve days;* water had forced itself below her deck, men had been injured, equipment carried away, the ship hove to, the pumps

could not be reached for sounding purposes and there was no chance even to serve out fresh water! (*Remarks*, pp. 8-15.)

Captain Quayle, in the words quoted, which concretely state his views of the situation, as shown by the log, simply concludes, as the master of the ship concluded, that the sea perils had strained his ship and made her "laborsome". Again, mark Captain Quayle's answer when he was asked by libellant's counsel the crucial question whether the damage

"*might* as well be from the nature of the stowage "as from unusual conditions of the weather?"

He answered pointedly:

"Now, *understand me,* it *could* be caused by the un-"usual stowage" (p. 119).

This is not expert testimony that the stowage was bad, or that the damage was caused by bad stowage. Coming as it did, after his cross-examination, we submit that it constituted *an almost complete retraction.* And so, we think the judge below, who saw and heard him, considered it.

This answer does no more than state a doubt. "It might or it might not."

In the leading case *Clark v. Barnewell,* 12 How. 280, the Supreme Court, after expressing the rule that though a loss be shown to have been caused by sea perils, it is still competent for the shippers to show that it might have been avoided by the exercise of *reasonable* skill, said:

> "But in this stage and posture of the case, the burthen is *on the plaintiff to establish* the negligence, as the affirmative lies upon him."

The court approvingly quoted from the summing up of Lord Denman in *Muddle v. Stride,* 9 Car. & Payne 380:

> "If on the whole it be left in doubt what the cause of the injury was, or *if it may as well be attributable to perils of the seas as to negligence,* the plaintiff cannot recover."

Captain Quayle, therefore, in saying that the stowage might have caused the damage, also impliedly said that the sea perils might have caused it.

Captain Steele, after admitting that the ship's master and stevedore are best qualified to judge whether the ship is well stowed, said:

"If a master is appointed on a ship, you must "take into consideration the build and everything "else and if you go out with a tow, you gain a little "experience of knowing her; *a ship kicks sometimes "when you don't think it will"* (p. 125).

The stevedore Burke testified to facts which tended to show that the master of the "Musselcrag" did not do what he says he did. His duty, on the discharging of the "Musselcrag" was on deck at the hatch. His whistle controlled the hoisting of a cargo out of the hatch at a rate of discharge which was unprecedented in this port. He did not see the evidence of what the captain said *he did.* The Supreme Court and all of the courts have frequently said:

> "What a witness asserts *he did* at the time, or *did not do* on his own vessel, is generally more satisfactory evidence of the fact than the opinions and belief of a dozen others formed from what they saw or heard on another vessel."

The Neptune, Olcott 495;
N. Y. v. Rumball, 21 How. 382;
The Sea Gull, 23 Wall. 179;
The Wenona, 19 Wall. 57.

At most, a calm interpretation of all of the evidence against the ship is that a doubt arises whether she was in *perfect* trim, and the correctness of this judgment must depend on the fact whether the libellant's witnesses had correctly gauged the build and character of the "Musselcrag", which they had never seen. This opinion of her trim, as we read their testimony, cannot be accepted as positively asserting that the seaworthiness of the vessel was affected. On the other hand, it is not decisively stated as the opinion of all of the witnesses that sea perils did not cause the damage.

The court below, which heard these witnesses, did not credit their extreme views. On all the facts, it found that reasonable care and skill had been used in the stowage. If this finding was only the resolving of a doubt in favor of the ship, it was justified by the decision of the Supreme Court already quoted.

Expert testimony is not a safe guide against the unimpeached evidence of a witness who asserts what he knows, because he did the thing. It is easy to

criticise. We all know that an expert is an advocate of the views of the party who calls him.

> "It is pleasant, when the sea is high and the tempest is raging, to behold *from afar the* danger of another."

Thus wrote the Latin poet, *Quintus Curtius,* as recollection of the reading of boyhood's days brings back his words. The ardor of the witnesses on behalf of the libellants is not harshly described in them.

We believe that we have laid before the court enough of the facts and of the character of the testimony given to justify us in saying that the weight of the evidence is not that the "Musselcrag" was unseaworthy or that unseaworthiness was the cause of damage. The direct evidence of master, mate, carpenter and all who testified in the ship's behalf shows overwhelmingly that the efficient cause of the damage was the sea peril which for fifty days threatened the ship's existence.

The silent testimony of the log which for sixty days failed to record straining or rolling, we think is, at least, some corroboration. On the other hand the entries of the damage suffered which invariably is taken by courts *as evidence of the fact of sea perils encountered,* viz.: laboring, straining, rolling, leaking of seams and being hove to, cannot also be taken *as evidence of unseaworthiness,* provided, they are recorded contemporaneously with the presence of hurricanes and overwhelming seas. A single storm of magnitude, if proved, accompanied by the presump-

tion of seaworthiness, exonerates a ship from liability for failure to deliver her cargo in good order. The record of forty storms or of one unintermitted storm of forty days here is written after the record of sixty days of voyage during which no sign appears that all was not going well with the ship. We repeat the statement that, if the ship's trim had been bad, if she had been too deeply laden, the entry of facts showing this to be her condition, must in some form have been made during those sixty days. And if there had been evidence of a lack of buoyancy, is it likely that the master and crew would have attempted to enter the stormiest of latitudes, without doing that which Captain Steele intimated and Captain Quayle said the master should, if necessity demanded, do, viz.: make the ship more "sea-kindly", less "laborsome", by lifting "some cargo from her hold"?

We call the attention of the court to the words of Sir Robert Phillimore:

> "If the bad weather had not occurred and the straining had not taken place, the cargo would, I think, have arrived without damage and consequently the proximate cause of the damage must be taken to have been the perils of the sea."
>
> *The Catharine Chalmers,* 2 Asp. Mar. Cases 599.

It seems to us, that the majority of the court erred in reversing the finding of the court below. The fact that Judge Gilbert could not agree with his brethren and that the judge who heard the witnesses held with us and that, seemingly, the majority of the court overlooked the fact that he had had this advantage, which

was denied to them, embolden us to ask for this re-hearing.

II.

We have quoted from the evidence of Captains *Quayle* and *Steele,* which we read to mean that a ship may leave port apparently in perfect trim and yet afterwards find that conditions, not known at that time, will require a change, in some respect, in the stowage. This seems clear, because no one can tell exactly how a ship will act when she starts on her maiden voyage. So, a master who, as in this case, joins a ship in a foreign port, cannot know her precise character, as regards buoyancy or stiffness. If it be necessary "to lift" cargo or to lower the weight of cargo, if she rolls or shows signs of being topheavy, clearly it is the master's duty to re-trim, as may be necessary. This he should and must do in the "management of the ship".

Such a condition, clearly, does not imply "initial unseaworthiness." Due care in seamanship can remedy the defect, if all that is required is re-trimming. The duty of re-stowage does not arise only when cargo has shifted. It calls upon the master to act before there is danger. Cargo is not jettisoned only as the result of an impending peril. It should be done before the probable peril threatens the loss of all of the adventure.

> "If the master does not exercise reasonable skill and judgment *and courage* in sacrificing goods for the benefit of the adventure, the master and the

owner of the ship are each liable to the owner of the goods sacrificed.''

Ralli v. Troop, 157 U. S. 400.

Nonfeasance and misfeasance equally create a responsibility.

Now, it is unquestionably true that goods stowed in a ship's compartment which has an unprotected porthole, through which water breaks in, are badly stowed. The ship is unseaworthy at the common law. Yet, under the Harter Act, if there is no immediate danger at the time of starting, a ship is not unseaworthy in such case because, if the master looks after his ship, he will close up the porthole and avoid loss. Such stowage is not initial unseaworthiness.

The Silvia, 171 U. S. 462.

The case of *Knott v. Botany Mills,* 76 F. R. 584, recognizes that a change in a ship's trim by movement of cargo, if intended ''primarily with reference to the '' ship and for the benefit of the ship, or with a view '' to her sea-going qualities'', though it be a fault, is one in the management of the ship. Clearly, a failure to make a change when demanded by the circumstances would, though a fault at the common law, fall within the protection of the Harter Act. We ask the court to keep in mind that we are presenting the case where the line is closely drawn, not the case where, *clearly,* the stowage is bad and the ship thereby is from the first unseaworthy.

In case of failure to jettison, when conditions require the master to take such action, though this also is a fault, he is nevertheless protected by the Act.

Now, although the Harter Act is inapplicable where unseaworthiness is shown, and although it gives no protection where the damage suffered is due to bad stowage or fault in the custody of the cargo, we submit that the adverse testimony of the witnesses in this case does not show initial unseaworthiness, or unseaworthiness of any kind. The testimony of the shipmasters, as we have said, recognizes that the case must come up in which perfection of stowage cannot be reached, because such perfection can be attained only by a long experience with the ship. In such case, though "due care and skill" have been exercised, the ship may show what Captain Steele calls "kicking". The careful master will recognize this and remedy the fault, as Captain Quayle said it could be remedied, by "lifting some cargo". Stowage is not unfit, nor is the ship unseaworthy, because of the fact that under extreme trial she develops a slight crankiness, or stiffness not anticipated. The remedy is not difficult of application, unless weather conditions forbid. The forty tons jettisoned lifted this ship, although at that time she was carrying a saturated cargo.

The court did not consider the application of the Harter Act to this branch of the case.

We feel satisfied that on further examination of the facts, the court will not find that the weight of the evidence was that the ship was initially unseaworthy by reason of bad stowage.

We regret that we should have to impose upon the court the labor of reading this petition, but respectfully ask consideration of the matters to which it refers.

CHARLES PAGE,

EDWD. J. McCUTCHEN.

llee.

We hereby certify that in our judgment the foregoing petition is well founded and that it is not interposed for delay.

Charles Page

Edw'd J. McCutchen

Samuel Knight

Proctors for appellee.